Mr. Somayya, who appears for the petitioner, has cited *Ramanathan Chettiar* v. *King-Emperor*(1) under the impression that the District Magistrate takes exception to the Sub-Magistrate's refusal to hold a *de novo* inquiry at the accused's request; but I do not gather that that point was ever in question. Of course the accused's right under section 350 is confined to trials and does not extend to inquiries. Nor do I gather that literal stress is laid upon the word "immediate". It is not suggested that the Sub-Magistrate framed the charge so immediately that he did not even peruse the record.

It is urged that the transfer ordered by the District Magistrate is no real hardship to any party and should be allowed to stand. The better rule when there has been any error is to restore the *status quo ante* and to allow the ordinary jurisdiction to prevail. Accordingly the order of the learned District Magistrate is set aside and the procedure of the Sub-Magistrate of Tirupati is affirmed.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan Pandalai.

CHINNA VENKATESU (ACCUSED), PETITIONER,

v.

PEDDA KESAMMA (COMPLAINANT), RESPONDENT.*

1930, September 15.

Indian Penal Code (Act XLV of 1860), sec. 447—Criminal trespass—Person in possession of property absent—Whether offence committed—Ploughing leased lands in absence of lessee, lessor coming to spot to prevent—Conviction under sec. 447—Validity of.

The offence of criminal trespass under section 447 of the Indian Penal Code may be committed even when the person in

(1) (1922) I.L.R. 46 Mad. 719.

* Criminal Revision Case No. 979 of 1929.

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possession of the property is absent, provided the entering into or upon the property is done with intent to do any of the acts mentioned in the section.

Where a person entered upon a field, that had been leased, during the absence of the lessee and ploughed it, and only the lessor came to the spot on hearing of it to prevent the commission of such acts, *held* that that was not enough to exonerate that person from intention to annoy the lessee and that such a person could properly be convicted under section 447.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Subdivisional Magistrate at Gooty in Criminal Appeal No. 39 of 1929 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Tadpatri in Criminal Case No. 112 of 1929.

S. Ranganadha Ayyar for petitioner.

T. R. Arunachala Ayyar for respondent.

A. Narasimha Ayyar for *Public Prosecutor* (*L. H. Bewes*) for the Crown.

JUDGMENT.

This is a petition to revise the conviction of the petitioner under section 447, Indian Penal Code, for criminal trespass for entering upon and ploughing up a field called Tunga Chenu, 2 acres 75 cents in extent, belonging to P.W. 1 and leased by her in Fasli 1339 to P.W. 5. The petitioner seems to have set up that he was the person in possession. This was found against, the findings being that the petitioner and the husband of P.W. 1 were two out of five brothers who had once been joint but had subsequently divided off, that these two brothers had divided from each other about four years prior to this occurrence, and that the widow, P.W. 1, had been in possession of this property since her husband's death and had paid the kist for it and had also in Fasli 1339 leased it by a registered instrument

to P.W. 5 for five years. The petitioner was convicted upon these facts upon the inference of the lower Courts that his intention in entering upon and ploughing up the field was to cause annoyance to P.W. 5. The petitioner now attacks this conviction upon two grounds. In the first place, he says that there is no distinct finding that there was any intention to annoy P.W. 5. In the second place, he says that, even if there were, such a finding would be incorrect, because, P.W. 5 being admittedly the person in possession at the time when the petitioner entered upon the property, he being then absent and only P.W. 1 being present on the property, there could be no possible intention to annoy an absent person.

As to the first point, I think the language of the Magistrates is clear, and they expressly found that the petitioner's intention was to annoy P.W. 5. As to the next point, reliance is placed upon three decisions to show that, where a person in possession is absent, there cannot really or fairly be said to be any intention to annoy him, and the intention, whatever it may be, is not to annoy but may be to assert a right or something else. The first decision relied upon is *In re Chinna Thoyi*(1). In that case a woman had entered the compound of the Assistant Superintendent of Police in his absence for the purpose of meeting her paramour and not for the purpose of stealing as was alleged. On those facts, the Court held that there was no reason for supposing that the woman's entry into the compound was made with the object of intimidating, insulting or annoying the absent Superintendent of Police or any other person. I consider that to be a decision upon those facts and not a general decision that in no circumstances can an absent possessor be

(1) (1895) 1 Weir 518.

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annoyed, even if facts exist from which such an inference may be drawn. On the contrary, another of the decisions cited to support this proposition, *Emperor* v. *Moti Lal*(1), contains observations which are to the opposite effect. In that case, there were two rival claimants, *A* and *B*, to some immovable property, including a certain shop. *A* had let the shop to a tenant who had left it. On the same day, before the lessor *A* could himself take possession, *B* entered the shop; and the question was whether that was criminal trespass. In the course of their judgment the learned Judges say;

> "First of all it is to be remarked that intimidation, insult or annoyance can in most cases arise only if the premises are in fact in the actual physical possession of somebody, as, for instance, the actual owner, his wife, servant, agent, licensee or other person. They are at all events results which more naturally follow when premises are occupied than when vacant."

The actual result of the case was that the Court held that the entry was a *bona fide* one for the purpose of asserting his title. But the observations above set forth show that it is unnecessary for a possessor to be always present upon his property in order that he may be annoyed by a trespasser; on the contrary, it was recognized that the actual owner need not be there, his wife, servant, agent, licensee or other person may be there. If so, why should any human being be actually present? Indeed, if that were the case, no person in possession of property could leave the property without the risk of some trespasser or intruder entering upon his premises and going scot-free upon the allegation that there was nobody to annoy. The learned Judges in the case cited merely observed "They (intimidation, insult and annoyance) are at all events results which more naturally follow when premises are occupied than when vacant". In my opinion, that stands to reason.

(1) (1925) I.L.R. 47 All. 855.

Can it be pretended, if a man in Madras locks his house and goes for a walk to the beach and comes back a few hours or minutes later, that any one who enters his house in his absence in circumstances from which an intention to annoy may be otherwise drawn cannot be guilty of criminal trespass because he was absent? The proposition has only to be so stated to show how absurd the result will be if that were the law. The only other case relied upon was the Full Bench decision in *Vullappa* v. *Bheema Row*(1). That was not a decision on this point at all. All that was decided there was that the essence of an offence under section 441 is the intention to commit an offence—to intimidate, insult or annoy. It was held that it was not sufficient to prove that the offender knew that his act was calculated or likely to cause annoyance, insult or intimidation. That is not the question here, that question as stated having been actually found. I, therefore, think that the fact that P.W. 5 was absent when the petitioner entered upon the land and that only the lessor came to the spot on hearing of the petitioner's acts in order to prevent his doing so is not enough to exonerate the petitioner from the intention to annoy the lessee. The conviction therefore was right.

In deciding as to the sentence, in my opinion, a fine of Rs. 100 is far too excessive in a case of this kind. The dispute was between a person and his brother's widow; and there was no necessity to visit this petty offence with such a heavy fine. The sentence will be reduced to a fine of Rs. 20, in default, one week's simple imprisonment. The rest of the fine, if paid, will be refunded.

B.C.S.

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(1) (1917) I.L.R. 41 Mad. 156 (F.B.).